

‘Catgate’ and the Challenge to Parliamentary

Sovereignty in Immigration Law

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As the Immigration Act 2014¹ neared the end of its passage through Parliament, the Joint Committee on Human Rights affirmed² its previously expressed concern³ that what is now section 19 of that Act was ‘a significant, and possibly unprecedented trespass by the legislature into the judicial function’.⁴ Section 19 insets a new Part 5A headed ‘Article 8 of the ECHR: Public Interest Considerations’ into The Nationality, Immigration and Asylum Act 2002⁵ in an attempt to reduce the influence of respect for private and family life ‘where a

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¹ c 22. The Act received the Royal Assent on 14 May 2014. What is now section 19 was variously clauses 14 or 18 of the Bill.

² Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (Second Report)* HL Paper 142/HC 1120 (2013-14) paras 100-111. This report was published on 3 March 2014.

³ Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* HL Paper 102/HC 935 (2013-14) paras 54-63.

⁴ Joint Committee on Human Rights, fn 2 above, para 109 (referring to Joint Committee on Human Rights, fn 3 above, para 60). The Lords Constitution Committee described this as a ‘significant’ ‘constitutional innovation’: Select Committee on the Constitution, *Immigration Bill* HL Paper 148 (2013-14) paras 9, 18. It is, of course, the precise method of section 19 that may be unprecedented. For the Joint Committee’s criticism of the efforts of a previous government to achieve a comparable shift in asylum and immigration adjudication see Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc) Bill* HL Paper 35/HC 304 (2003-04) paras 52-76.

⁵ c 41.

court or tribunal is required to determine whether a decision made under the Immigration Acts breaches ... Article 8'.⁶ Much of Part 5A lists these public interest considerations in an unusual but essentially unproblematic manner.⁷ But the new sub-sections 117B(4) and (5) instruct a court or tribunal to give 'little weight' to 'a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when a person is in the United Kingdom unlawfully' or to 'a private life established by a person at a time when the person's immigration status is precarious'. There can be no doubt that that these sub-sections, regardless of the declaration of compatibility⁸ and the title of Part 5A,⁹ do not merely tell a court or tribunal what considerations to take into account but instruct them how to balance those considerations against the Art 8(1) right, despite an evasive Government denial that this is the case.¹⁰ The Joint Committee proposed amendments to the Immigration Bill intended to

⁶ s 117A(1).

⁷ ss 117A(2)-(3), 117B(1)-(3).

⁸ Immigration Bill (as introduced) HC Bill 110 (2013-14).

The Act is the primary legislation which the Home Secretary has long maintained would follow if 2012 changes to the Immigration Rules did not have 'the intended effect' of making 'the Courts ... have regard' to 'Government's [and] Parliament's view of how the balance should be struck between the public interest and individuals' rights under Article 8': Mrs Theresa May, Home Secretary, *Letter to Dr Hywel Francis MP, Chair of the Joint Human Rights Committee* (4 December 2012)

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/other-scrutiny-work/immigration-rules/> The Government took enormous pains to state that these changes to these quasi-legislative rules were compatible: Home Office, *Immigration Rules on Family and Private Life (HC 194): Grounds Of Compatibility With Article 8 Of The European Convention On Human Rights* (13 June 2012)

<https://www.gov.uk/government/publications/immigration-rules-on-family-and-private-life-hc-194>

⁹ The Immigration Bill's Explanatory Notes said only that 'the new section 117B lists the public interest considerations which are applicable in all cases': HC Bill 110-EN (2013-14) para 85 and HL Bill 84-EN (2013-14) para 93.

¹⁰ *Government Response to the Joint Committee on Human Rights, Eighth Report of Session 2013-14*, para 14: http://www.parliament.uk/documents/joint-committees/humanrights/Govt_response_re_Immigration_Bill.pdf As the Joint Committee points out, fn 2 above, para 110, this response simply does not address its concern. A Home Office reply to the Constitution Committee merely referred to the Lords Committee Stage debate on the Immigration Bill: Lord Taylor, Lords Minister and Minister for Criminal

nullify this instruction,¹¹ but sub-sections 117B(4) and (5) passed into law completely intact. An amendment moved by Lord Pannick literally removing these sub-sections was withdrawn after the debate it was intended to provoke had taken place.¹²

The Government has taken this remarkable and troubling step because it is very concerned that there is so excessive a number of successful appeals against deportation or removal on Art 8 grounds¹³ that a ‘situation’ prevails in which ‘those claiming the right to ... remain in the UK on the basis of ECHR Article 8 ... do so essentially without regard to the Immigration Rules’.¹⁴ One would say that the seriousness of the Government’s concern about this situation cannot be exaggerated were it not that many of its public pronouncements about it, especially by the Home Secretary, do in fact use the most exaggerated language. When moving his amendment, Lord Pannick referred¹⁵ to a newspaper article in which the Home Secretary said that she would ‘fight any judge’¹⁶ who opposed the policy which lies behind Part 5A. Lord Pannick professed not to see what the fuss was about:

The ... problem I have with [what is now section 19] which motivated [this amendment] is whether there really is a mischief that needs to be addressed ... a very serious allegation has been made against the judiciary. I do not speak for the judiciary, but I simply cannot understand the factual premise for [section 19], and

Information, *Letter to Baroness Jay, Chairman of the Select Committee on the Constitution* (14 March 2014): <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/>

¹¹ Joint Committee on Human Rights, fn 2 above, para 111.

¹² HL Deb (2013-14) vol 752 cols 1391-1404 (5 March 2014).

¹³ Home Office, *Impact Assessment of Reforming Immigration Appeal Rights*, IAHO0096 (1 October 2013). The Home Office is similarly concerned about entry decisions.

¹⁴ Home Office, *Statement of Intent: Family Migration* (June 2012) para 7.

¹⁵ HL Deb (2013-14) vol 752 col 1392 (5 March 2014).

¹⁶ T May, ‘It’s My Job to Deport Foreigners Who Commit Serious Crime and I’ll Fight Any Judge Who Stands in My Way, Says Home Secretary’ (17 February 2013) *Sunday Mail*: <http://www.dailymail.co.uk/debate/article-2279828/Its-MY-job-deport-foreigners-commit-crime--Ill-fight-judge-stands-way-says-Home-Secretary.html>

nor, if I may say so, can anyone else practising in this field to whom I have spoken.¹⁷

Lord Pannick no doubt accurately describes his own position and that of his learned colleagues. But this does not, in my opinion, point to want of a mischief addressed by section 19. Rather it points to the want of an appreciation of that mischief by those subscribing to what I have in this journal previously called the ‘HRA jurisprudence’,¹⁸ even though that mischief amounts to a challenge to sovereignty of Parliament, and through this democratic policy-making, in immigration matters. This want of appreciation is the latest contribution of the HRA jurisprudence to the unconstructive polarisation of views about the operation of the Human Rights Act 1998¹⁹ which it is the purpose of this paper to discuss.

Lord Pannick also made reference to the most famous of the expressions of the Government’s concern,²⁰ the Home Secretary’s speech at the 2011 Conservative Party conference in which she claimed that the ‘misinterpretation’ of Art 8 which prevents ‘the deportation of people who shouldn’t be here’ was one of the reasons she was ‘of the view that the Human Rights Act must go’.²¹ This speech received enormous public attention, particularly in respect of an example she gave of such misinterpretation, that of an ‘illegal immigrant who cannot be deported because – and I am not making this up – he had a pet

¹⁷ HL Deb (2013-14) vol 752 col 1392 (5 March 2014).

¹⁸ D Campbell, ‘The Threat of Terror and the Plausibility of Positivism’ [2009] *Public Law* 501, 502.

¹⁹ c 42.

²⁰ HL Deb (2013-14) vol 752 col 1392 (5 May 2014). The Lords Committee also referred to this case: fn 4 above, para 13. Just after the Home Secretary’s speech, Lord Pannick had joked that her cat example ‘had turned out to be a shaggy dog story’: A Wagner, ‘The Lessons of Shaggy Dogs and Catgate’ (5 October 2011) *UK Human Rights Blog* <http://ukhumanrightsblog.com/2011/10/05/the-lessons-and-shaggy-dogs-and-catgate/>

²¹ T May, *Speech to the 2011 Conservative Party Conference* (4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>

cat'.²² The Home Secretary was not, indeed, entirely making it up. She had actual Asylum and Immigration Tribunal proceedings somewhere in mind, though, as we shall see, they involved neither deportation nor an illegal entrant,²³ and that the appellant had a pet cat cannot remotely be regarded as *the* ground for his successful challenge to his removal. It is necessary to say that, though when considered as an exercise in seeking cheap political advantage, the Home Secretary's use of this example was ultimately very effective,²⁴ when considered as a responsible contribution by the holder of high office to the democratic deliberation of a difficult issue, it is impossible to justify.

But nor is it possible to justify the line taken by Lord Pannick. Though his reference to the Home Secretary's example of the cat was calculated to undermine the case for section 19, Lord Pannick left his criticism of that example implicit. But his thinking was recently given clear expression in the attempt by Ms Michelle Lafferty, a lawyer in the Registry of the European Court of Human Rights writing in her personal capacity, to dispel certain 'myths' which are 'a source of regret and disappointment to those who support the European Court of Human Rights and to those who work within its walls'.²⁵ The very first example Ms Lafferty gives of the Court's judgments being 'often misrepresented in the United Kingdom' is 'Catgate'. Citing characteristic HRA jurisprudence responses to this episode which claim that

²² *ibid.*

²³ As defined by the Immigration Act 1971 (c 77) s 33 (as amended).

²⁴ Though conference received the speech with great enthusiasm, an awkwardness arose when the then Justice Secretary, Mr Kenneth Clarke, immediately reacted to the cat example with incredulity and accused the Home Secretary of extreme gullibility: Anon, 'Clarke Hits Out at "Childish Remarks"' (6 October 2011) *Nottingham Post*: <http://www.nottinghampost.com/Clarke-hits-childish-remarks/story-13490799-detail/story.html>

²⁵ M Lafferty, 'The Strasbourg Court and the UK: Dispelling the Myths' (2014) 18 *Edinburgh Law Review* 136.

‘the cat had nothing to do with the failure to deport’,²⁶ Ms Lafferty herself claims that ‘In fact, the Home Office lost the case because it failed to follow its own guidance’.²⁷

This account of the case manages to accomplish what one would have thought very difficult by being actually less accurate than the Home Secretary’s. Though we shall see that the cat featured only in a most unusual way in the appeal, it played a very important role in the original Tribunal determination, and that it did so gives rise to a perfectly legitimate concern, not for our purposes about immigration policy, but about the way that a decision about removal was reached in effective disregard of the relevant domestic legislation and, I will argue, of Art 8.

One might understandably think that Catgate, and certainly much public discussion of it, was rather foolish and, especially as Asylum and Immigration Tribunal proceedings cannot normally be thought to be able bear the weight of constitutional argument I am about to place upon them, perhaps it is now best just to put the episode behind us. It is not, in truth, any jurisprudential quality that should draw our attention to these proceedings, which we shall see were in a strong sense ramshackle, though it is very important that they did, in fact, in the end give effect to the law as it was then being expressed by the House of Lords. The significance of Catgate lies in the continuing inability of those committed to the HRA jurisprudence such as Lord Pannick and Ms Lafferty to see what is wrong with the judicial attitude displayed in that episode. A proper examination of Catgate shows it to turn on a use of proportionality

²⁶ A Wagner, ‘Cat Had Nothing to Do with Failure to Deport Man’ (4 October 2011) *UK Human Rights Blog*: <http://ukhumanrightsblog.com/2011/10/04/cat-had-nothing-to-do-with-failure-to-deport-man/> When giving evidence about the work of the *UK Human Rights Blog* of which he is an editor to the Leveson inquiry, Mr Wagner referred to Catgate as ‘the most famous example of the misrepresentation of human rights ... perhaps ever’: A Wagner, *Witness Statement to the Leveson Inquiry into the the Culture, Practice and Ethics of the Press* (7 February 2012) para 32(a): <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/evidence/?witness=adam-wagner> Many others, including some of the most distinguished contributors to the HRA jurisprudence, took essentially Mr Wagner’s line.

²⁷ Lafferty, fn 25 above, n 1.

arguments by courts and tribunals which in effect strikes down legislation in just the way that the Human Rights Act is not meant to do, and it is this that has brought the Government to the point where sub-sections 117B(4) and (5) seem sensible. That this is the case and that it is impossible to approve of the innovation which would be brought about by these sub-sections leaves the future of the Human Rights Act in general uncertain and even bleak. The purpose of this article is to show that the HRA jurisprudence bears an aliquot part, and in my opinion the principal part, of the responsibility for this state of affairs.

The facts of Catgate

Catgate arose from a successful 2008 challenge to removal, under procedures which have since considerably changed but the changes to which need not be discussed here, heard by Immigration Judge Devittie²⁸ and upheld by Senior Immigration Judge Gleeson.²⁹ The appellant, one Sr Camilio Renzo Soria, a Bolivian national, had entered the UK on 7 July 2002 as an architecture student, with permission to remain until 30 November 2004. He unlawfully remained in the UK after the expiration of his student visa in part because earlier in 2004 he had entered into an intimate relationship with Mr Frank Trew, a British national, living in a rented flat with Mr Trew from either later in 2004 or from 2005. On 21 February

²⁸ Asylum and Immigration Tribunal, IA/14578/2008, 24 September 2008, Immigration Judge Devittie. I believe that no authorised transcript of this decision is publicly available. A copy is available from the author and at Anon, 'Catgate: *The Mail* Wrong to Claim Cat Was "Key Reason" in Judgment' (6 October 2011) *Full Fact*

https://fullfact.org/blog/catgate_catflap_Daily_Mail_immigrant_bolivian_cat_deportation-3018

The name of the appellant (and, not entirely consistently, also of Maya the cat!) is suppressed. My understanding of the facts is based on those given in this determination and its reconsideration, supplemented by various media accounts. The nature of the reports of these deliberations and the incompleteness of, and the inconsistency between, even the better of those accounts make it impossible to be completely confident about all those facts.

²⁹ Asylum and Immigration Tribunal IA/14578/2008, 1 December 2008, Senior Immigration Judge Gleeson, promulgated 10 December 2008. This decision may be found on the IAT/AIT archive by searching by date of promulgation:

<http://www.ait.gov.uk/Public/searchUnreported.aspx>

2007 Sr Soria effectively brought himself to the attention of the immigration authorities, which do not appear to have previously actively pursued him, by being caught shoplifting a figurine cat from a department store. He then brought an application for leave to remain which was refused and directions for his removal were made.

In her conference speech the Home Secretary focused on failures to deport foreign nationals who had committed serious offences, and it would be understandable if those hearing that speech believed the ‘illegal immigrant who ... had a pet cat’ to be such a criminal, as indeed many did. Referring to the matter as one of deportation will have encouraged this misunderstanding. Deportation is a term which has no clear legal definition but which, whatever may previously have been the case,³⁰ then,³¹ as now, connoted the expulsion of a seriously undesirable foreign national coupled with a prohibition on re-entry. But Sr Soria was not a foreign criminal of the sort which section 117C specifically addresses. He was not even charged with an offence in connection with his shoplifting, but any offence of which he could possibly have been convicted would not have been serious enough either to make his deportation under the then prevailing law likely or to now bring him within the definition of a foreign criminal under sub-section 117D(2) of the new Act. His removal was sought because he was an over-stayer whose presence was in breach of the terms of his entry. Sub-sections 117B(4) and (5) address cases like Mr Soria’s, which seems to be four square with sub-section 117B(4)(b).³²

³⁰ Immigration Act 1971 (c 77) s 3(5)(a) (as originally passed).

³¹ Immigration Act 1971 s 3(5)(a) (as amended by the Immigration and Asylum Act 1999 (c 33) s 169(1), Sched 14 para 44(2)).

³² Sr Soria’s immigration status was described as both ‘unlawful’ and as ‘precarious’ by Judge Devittie (fn 28 above, paras [3], [11]) but surely it was unlawful. His family life argument would therefore now fall under s 117B(4)(b). But not all family life arguments would do so, and a family life argument does not appear to be captured at all by s 117B(5). This drafting seems questionable.

Immediately after the Home Secretary had made her speech, the Judicial Communications Office reissued a press statement which the Judicial Office had previously issued after the determination by Judge Gleeson was promulgated. It read:

This was a case in which the Home Office conceded that they had mistakenly failed to apply their own policy - applying at that time to that appellant - for dealing with unmarried partners of people settled in the UK. That was the basis for the decision to uphold the original tribunal decision - the cat had nothing to do with the decision.³³

This was very widely seized on as evidence that the cat played no role in the determination and that the Home Secretary had been incompetent or even of dubious honesty.³⁴ But this statement proved to be even more misleading than the Home Secretary's speech. It referred only to Judge Gleeson's determination, which did indeed focus on the application of guidance to Sr Soria's case. However, not only is this, with respect, a most puzzling decision, but it is not the decision on which debate needs to concentrate.

The two grounds on which the Secretary of State was granted reconsideration before Judge Gleeson were that Judge Devittie had placed 'inappropriate weight ... on the appellant having to leave behind not only his partner but also their joint cat', and that in reaching his determination he had applied guidance which had been withdrawn some months prior to the hearing.³⁵ Judge Gleeson held that under transitional provisions the guidance should have

³³ P Henley, 'Theresa May in Deportation Cat Flap' (4 October 2011) *BBC News England*: <http://www.bbc.co.uk/news/uk-england-15174254> I am obliged to quote from this source (the text of which is corroborated by innumerable other media sources) because I have been unable to locate an official version of this statement (it is not in the Judicial Communications Office's website archive) or to obtain definitive official answers to a number of questions about its source. I nevertheless must discuss this statement because it was absolutely central to Catgate.

³⁴ D Allen Green, 'Theresa May Gets It Wrong About a Cat: The Home Secretary's Conference Speech Shows that She Does Not Know What Her Own Department Is Doing' (4 October 2011) *New Statesman*: <http://www.newstatesman.com/blogs/david-allen-green/2011/10/home-secretary-cat-immigration>

³⁵ Senior Immigration Judge Gleeson, fn 29 above, para [2].

been applied,³⁶ and seems to have found for Sr Soria for this reason. But this does not, with respect, give her decision any sound footing. For, amidst confusion about this guidance which the case as reported does not eliminate, it does emerge that the guidance *had* been applied at the first hearing,³⁷ with the Secretary of State in part arguing on this basis!³⁸ As Sr Soria suffered no prejudice in respect of the guidance, that the Secretary of State seems to have got into a muddle about it, the nature of which the case as reported leaves entirely unclear, is a mere technicality.³⁹

The substantive point Judge Gleeson had to decide was about the weight given to having the pet cat, but she does not discuss this at all, and this leaves her decision without any substantive basis whatsoever. As reported, that decision is, with respect but one has to say, ramshackle. Her only comment on the cat was a, with respect, unwise attempt at a joke with which she saw fit to conclude her determination: ‘The Immigration Judge’s determination is upheld and the cat [name suppressed] need no longer fear having to adapt to Bolivian mice’.⁴⁰ This overwhelmed proper consideration of her decision and led to some public confusion about whether her thinking had turned on the rights of the cat!⁴¹ But the sympathy

³⁶ *ibid*, para [5]. The guidance had been withdrawn on 24 April 2008.

³⁷ Immigration Judge Devittie, fn 28 above, para [17].

³⁸ *ibid*, para [3]. The Secretary of State’s manner of argument before Judge Devittie and, even more, before Judge Gleeson is, as reported, incomprehensible.

³⁹ Senior Immigration Judge Gleeson, fn 29 above, para [6] (my emphasis): ‘Had the transitional provisions been properly applied, the Immigration Judge would have been entitled to allow the appeal under DP3/96 *as he had in fact done*’.

⁴⁰ *ibid*, para [7].

⁴¹ One would say that discussion of things like this has no place in this journal, save that Judge Devittie’s decision as reported leads one to think that, scarcely credibly, the Secretary of State seems to have considered whether ‘the appellant’s removal would have any consequences for the appellant’s family life of Maya [*sic*]’ for ‘she is considered to be able to adapt to life abroad’: Immigration Judge Devittie, fn 28 above, para [14]. Perhaps the best interpretation of this is that it was itself a joke intended to ridicule the submission about the cat. Mr Barry O’Leary, of Wesley Gryck Solicitors LLP, who acted for Sr Soria, issued his own press release on 6 October 2011, and has kindly provided the author with a copy. It is

one has with what one imagines were Judge Gleeson's feelings when she saw her joke go so badly wrong does not give any greater weight to her decision as such. It is as if merely getting into some purely technical muddle about the guidance was enough for the Secretary of State to fail overall, and though it seems that the Secretary accepted this at the reconsideration hearing,⁴² this is a *non sequitur* which left the only point of substance to be considered in the appeal untouched, indeed entirely unexamined. And this is of real significance because the cat was in fact an important ground of the original determination.⁴³ The defences that have been made of Catgate based on stressing the technical aspect of the determination entirely obfuscate the point of importance both for that determination and more widely.

The reasoning in Catgate

Being unarguably an over-stayer, Sr Soria mounted an Art 8(1) family life argument against removal based on establishing that he was 'the unmarried partner of a person present and

substantially but not completely reproduced in Allen Green, fn 34 above. Mr O'Leary traces all this to a 'rather mischievous' part of the letter of refusal of Sr Soria's application for leave to remain. Mr O'Leary instructed Mr Ronan Toal of Garden Court Chambers, and in a press interview Mr Toal also put forward this explanation of this particular piece of nonsense: P Curtis, 'Reality Check: Can Owning a Cat be Grounds for Appeal Against Deportation?' (4 October 2011) *The Guardian* <http://www.theguardian.com/politics/reality-check-with-polly-curtis/2011/oct/04/reality-check-cat-theresa-may>

⁴² Senior Immigration Judge Gleeson, fn 29 above, para [6]. In his press release, fn 41 above, Mr O'Leary more clearly says that this was the case.

⁴³ Although I am unaware of any media account which properly related the two Tribunal findings, the correct significance of the cat was not entirely unappreciated by the media at the time of the Home Secretary's speech: T Whitehead and R Alleyne, 'Discovered, the Real Cat that Made Tory Fur Fly' (5 October 2011) *Daily Telegraph*: <http://www.telegraph.co.uk/news/politics/conservative/8809836/Discovered-the-real-cat-that-made-Tory-fur-fly.html> and T Whitehead *et al*, 'Immigrant in Pet Row was Shoplifter' (6 October 2011) *Daily Telegraph*: <http://www.telegraph.co.uk/news/uknews/immigration/8811968/Immigrant-in-pet-cat-row-was-shoplifter.html>

settled in the United Kingdom'.⁴⁴ Apart from the oral evidence of Sr Soria and Mr Trew and photographs and similar evidence of their relationship,⁴⁵ their friends and Mr Trew's siblings gave witness statements and provided letters of support, and another friend gave oral evidence. Judge Devittie regarded this as 'credible evidence' 'that the appellant and his unmarried partner have established family life', indeed had 'lived together for about four years', and he was 'satisfied therefore that the appellant's removal would constitute interference with his family life'.⁴⁶

Having established the existence of family life, Judge Devittie turned to the second stage of the effectively two-stage process of reasoning⁴⁷ in Art 8 immigration deliberations and asked whether removal was proportionate, and in particular 'whether the appellant's removal would have sufficiently serious consequences to render his removal disproportionate having regard to the public interest in the removal of persons whose residence in the United Kingdom is unlawful'.⁴⁸ This goes to the fourth of the questions that the Constitution Committee notes a court (or tribunal) is required to ask when determining proportionality in immigration cases: 'whether a fair balance has been struck between the rights of the individual and the interests of the community'.⁴⁹

It is uncontroversial that removal may be justified as pursuant to an aim recognised under Art 8(2), and Judge Devittie made explicit mention of 'legitimate policy considerations

⁴⁴ Immigration Judge Devittie, fn 28 above, para [1].

⁴⁵ There was evidence of a joint bank account (*ibid*, para [6]), but this is hard to understand as surely any such account would have had to be created by serious criminal fraud.

⁴⁶ *ibid*, paras [6], [7], [17].

⁴⁷ I put to one side the shortcomings of this approach, though they are particularly clearly manifested in *Catgate: G Webber, The Negotiable Constitution* (Cambridge: Cambridge University Press 2010) 56.

⁴⁸ *ibid*, para [11].

⁴⁹ Select Committee on the Constitution, fn 4 above, para 10. See *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 at paras [19]-[20].

mainly to do with deterrence on which rest the requirement that persons in the appellant's position be required to make out of country applications'.⁵⁰ He was here referring to the important fact that this was not a deportation case. After removal, Sr Soria would have been at liberty to make an out of country application to enter on the basis of his intimate relationship with Mr Trew, and Mr Trew 'certainly [had] the financial means to sponsor an application for re-entry'.⁵¹ The main reason given for the withdrawal of the guidance which was the subject of Judge Gleeson's determination was that the Government had come to the view that that guidance was overly generous to those in Sr Soria's situation by comparison to those who made out of country applications.⁵²

That guidance gave particular weight to the presence of dependent children who should not themselves be removed as a reason not to allow removal.⁵³ At its core, this is uncontroversial and sub-section (6) of section 117B effectively prohibits removal in these circumstances. However, despite the picture of heterosexual connubial bliss imaginatively painted in a number of accounts of the case sympathetic to Sr Soria,⁵⁴ in the circumstances of homosexual partners who were childless when they met and whose relationship could not be formalised because one of them was in the UK unlawfully, there could not (outside of far-

⁵⁰ Immigration Judge Devittie, fn 28 above, para [17].

⁵¹ *ibid.*

⁵² Mr Liam Byrne, Minister for Borders and Immigration, HC Deb (2007-8) vol 474 cols 109-110WS (24 April 2008).

⁵³ Enforcement Policy Group, *Marriage Policy* DP3/96 (13 March 1996), para 7. This guidance may be found by searching the National Archives by its reference number: http://webarchive.nationalarchives.gov.uk/search/?lang=en&noneW=&format=all&site=&search_type=category&x=31&y=12&exactW=&where=text&query=DP3%2F96&x=0&y=0

⁵⁴ J Welch, 'Theresa May's Twisted Tale of a Bolivian's Cat' (4 October 2011) *theguardian.com*: <http://www.theguardian.com/commentisfree/2011/oct/04/theresa-may-cat-human-rights-act> 'The appellant's ... right to remain in this country had nothing to do with his cat. For four years before his case came before the immigration courts the man lived with a British woman. They did all those coupley things: bought crockery, went out clubbing, got a pet cat. When it came to wanting to regularise the man's right to stay in this country – and anticipating immigration officials' inevitable scepticism – the shared cat was one of a number of factors used by the couple as evidence their relationship was genuine'.

fetched speculation) be any dependent children. The guidance also gave particular weight to its being ‘unreasonable to expect a settled spouse to accompany his/her spouse on removal’,⁵⁵ and it was found that Mr Trew’s participation in arrangements with his siblings for the support of their father who was in deteriorating health made such an expectation unreasonable.⁵⁶

As the matter is reported, it was to strengthen his claim to have an Art 8(1) family life that the appellant drew attention to Maya the cat,⁵⁷ which a friend had given him and Mr Trew in 2005.⁵⁸ This was ingenious pleading which met with a very warm reception indeed. Judge Devittie saw fit to undertake a substantial review of the position in the Canadian and US laws of tort which he claimed evidenced:

an increasing recognition of the significance that pets occupy in family life and of the potentially serious emotional consequences pet owners may suffer when some unhappy event terminates the bond they have with a pet [and a movement] away from the legal view that animals are mere chattels, to a recognition that they play an important role in the lives of their owners and that the loss of a pet has a significant emotional impact on its owner.⁵⁹

On the strength of this, Judge Devittie was able to conclude that ‘The evidence concerning the joint acquisition of Maya by the appellant and his partner reinforces my conclusion on [sic] the strength and quality of the family life that appellant and his partner enjoy’.⁶⁰

Nothing can more clearly show that one’s evaluation of evidence can be extremely influenced by one’s predispositions than the polarisation of opinion about Judge Devittie’s

⁵⁵ *Marriage Policy*, fn 53 above, para 5(b).

⁵⁶ Immigration Judge Devittie, fn 28 above, paras [4b], [12].

⁵⁷ In his press release, fn 41 above, Mr O’Leary clearly said that Sr Soria’s and Mr Trew’s ‘ownership of a cat was just one detail amongst many given to demonstrate the genuine nature of their relationship’ and this was repeated by Mr Toal in his press interview: Curtis, fn 41 above.

⁵⁸ Immigration Judge Devittie, fn 28 above, paras [4b], [14].

⁵⁹ *ibid*, para [15].

⁶⁰ *ibid*.

determination. But if there is to be any expansion of the consensus that is necessary to make productive discussion of policy possible, the HRA jurisprudence has to acknowledge that the cat was not irrelevant to the substance of Sr Soria's case but played an important part in it. It was not even just the case 'that the cat was only mentioned in passing'.⁶¹ The appellant *did* raise the ownership of the cat in support of his argument and Judge Devittie *did* make a substantial and striking effort to give the ownership of pets an important weight in cases like Sr Soria's.⁶²

Because the last thing this topic needs is the use of inflammatory words in its discussion, I am denied the use of the vocabulary appropriate to express my own opinion of this argument by the appellant and, even more, its reception by Judge Devittie. It is enough to say that it is all so questionable that, in the end, 'the thrust of the point the Home Secretary was seeking to make ... was unquestionably correct'.⁶³ Judge Devittie used the cat as part of a proportionality argument that was not, with all respect, a balancing within the confines of the domestic legislation (or even the Convention) but an attempt to justify effective disregard of that legislation. And the crucial point is that, nevertheless, his reasoning was in an important sense perfectly sound. He reached his determination after reviewing three House of Lords cases⁶⁴ on deportation and removal,⁶⁵ of which the then recently decided⁶⁶ but

⁶¹ Curtis, fn 41 above. Whilst the determination to which she refers gave an answer to her question the opposite of the one she thought, Ms Curtis was unusual amongst media commentators in at least identifying the right proceedings (and essentially correctly conveying the significance of the cat).

⁶² The only media account of which I am aware which makes both of these two crucial points is D Barrett, 'Bolivian "Cat-gate" Immigrant Cashes In On Tory Conference Fame' (8 October 2011) *Daily Telegraph*: <http://www.telegraph.co.uk/news/uknews/immigration/8815428/Bolivian-cat-gate-immigrant-cashes-in-on-Tory-conference-fame.html>

⁶³ J Fisher, *Rescuing Human Rights* (London: Henry Jackson Society 2012) 38.

⁶⁴ Although he wrongly located it in the judgment of Laws LJ when it actually is *dicta* of Lord Bingham, Judge Devittie found his principal instruction 'on the spirit that lies behind Art 8' in a passage which has since become a cornerstone, not merely of immigration law, but

subsequently extremely influential *Chikwamba* was the most closely analogous to Sr Soria's case. In that case, an appeal against removal was upheld in these terms by Lord Scott:

Not many would dispute, and I do not, that would-be immigrants who desire to remain permanently in this country should apply for permission to do so before coming here. It is the Government's policy that that should be so and that a failed asylum seeker should return, or be returned, to his or her country and make from there any applications for the right to reside in this country that he or she desires to make. But policies that involve people cannot be, and should not be allowed to become, rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not ... The claimant, in her appeal, relies on Article 8 of the Convention and, for my part, I regard the decisions of the lower courts as clearly unreasonable and disproportionate. It is, or ought to be, accepted that the claimant's husband cannot be expected to return to Zimbabwe, that the claimant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the claimant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that Government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it.⁶⁷

Conscious myself of the Kafkaesque quality of much administrative law,⁶⁸ I should hope to be the last to deny the possibility that Lord Scott's criticism of Government policy may well be right (though I do not think so). But it cannot be useful to deny that *Chikwamba* was part of what might be called a judicial debate about the merits of that policy.⁶⁹ The

of the interpretation of proportionality generally: *Huang v Secretary of State for the Home Office*, fn 49 above, para [18].

⁶⁵ Immigration Judge Devittie, fn 28 above, paras [8]-[10].

⁶⁶ The Lords' judgment was handed down on 25 June 2008. *Chikwamba* had received very considerable attention prior to that. The third case Judge Devittie discussed, *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 AC 115, was handed down on the same day.

⁶⁷ *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420 at paras [4], [6].

⁶⁸ D Campbell, 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 7 *The Journal Jurisprudence* 487, 507-31.

⁶⁹ *Chikwamba v Secretary of State for the Home Department*, fn 67 above, paras [38]-[41]. The Lords reversed the Court of Appeal, which itself had affirmed the determination of the Immigration Appeal Tribunal. The single reasoned judgment of the Court of Appeal handed

House of Lords, having made its own contribution to numerous judicial criticisms of the policy of removing persons who were unlawfully present and requiring them to make out of country applications, then blatantly refused to enforce that policy, even though the Government was so far committed to it as to go to the Lords to defend it. Now, *Chikwamba* was itself an asylum case involving a possibly dangerous country and the interests of a child. But the decision on those facts was based on the normalisation of disregard of a clear legislative intent which had failed to find favour in the judicial debate,⁷⁰ and it was surely inevitable that we would get Catgate, the removal to a perfectly safe country of a student over-stayer whose family life was of so ordinary a sort that he believed that pleading that he had a cat would strengthen his Art 8(1) argument. I believe that some consciousness of the democratic indefensibility of such disregard has shaped the denial of the role of the cat that characterises the HRA jurisprudence's reaction to Catgate, and Judge Devittie's animal doctrine has not flourished; indeed, I can find no trace of it in subsequent cases.

Immigration law, proportionality and sovereignty of Parliament

The primary legislation under which Sr Soria might have been removed is the Immigration and Asylum Act 1999 s 10(1)(a), which provides that: 'A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if ... having only a limited leave to enter or remain, he does not observe

down by Auld LJ is, I submit, an exemplary account of the Government's policy and of authority critical but ultimately appropriately deferential to that policy: [2005] EWCA Civ 1779. It is examined by the Lords at fn 67 above, paras [17]-[37].

⁷⁰ *Chikwamba v Secretary of State for the Home Department*, fn 67 above, para [44] per Lord Browne: 'I am far from suggesting that the Secretary of State *should* routinely apply the policy [of requiring an out of country application] in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad'.

a condition attached to the leave or remains beyond the time limited by the leave'.⁷¹ This provision was, one would have thought it indisputable to say, passed with the intention that it would lead to the removal of those broadly in Sr Soria's position, despite those in that position obviously having a family life. Referring to the relevant Immigration Rule, the guidance about which there was such confusion explicitly⁷² states that: 'the fact that an offender is married to a person settled here does not give him/her any right to remain under the Rules'.⁷³ The exercise of the s 10 power, and previous similar powers under the Immigration Acts,⁷⁴ has always had to be read subject to Art 8. But, in addition to the simple, and simply enormous, growth in immigration proceedings,⁷⁵ what has changed since the statutory recognition that the Human Rights Act 1998 s 6 applies to immigration decisions⁷⁶ is that 'the traditional common law grounds of review'⁷⁷ have increasingly been supplanted by review on the basis of proportionality, and taxing courts and tribunals with determining 'a fair balance between the rights of the individual and the interests of the community'⁷⁸ has been made central to removal decisions. The expanding scope of the concept of proportionality has acutely posed the problem, recognised by the open-minded even when

⁷¹ s 10 will be replaced by Immigration Act 2014 s 1 when that section is brought into force. Sr Soria would fall under s 1(1).

⁷² Subject to changes in the understanding of 'marriage' which need not be pursued here.

⁷³ *Marriage Policy*, fn 53 above, para 4. Sr Soria's challenge being based entirely on Art 8, it does not emerge why a 'compassionate circumstances' exception explicitly provided under this guidance was not pursued in his case.

⁷⁴ ie going back to the Immigration Act 1971: Interpretation Act 1978 (c 30) s 5, Sched 1 and UK Borders Act 2007 (c 30) s 61.

⁷⁵ Leaving aside the burden this has imposed on what is now HM Courts and Tribunals Service generally, a particular concern has arisen over the operation of judicial review, which is now dominated by asylum and immigration matters: Ministry of Justice, *Judicial Review: Proposals for Reform*, Cm 8515 (2012) para 29.

⁷⁶ Immigration and Asylum Act 1999 s 65(2)(c) (now Nationality, Immigration and Asylum Act 2002 s 84(1)(c)); a new s 84 is to be substituted by the Immigration Act 2014 s 15(4)).

⁷⁷ Select Committee on the Constitution, fn 4 above, para 11.

⁷⁸ *ibid*, para 10.

broadly in favour of the development,⁷⁹ that ‘there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government’.⁸⁰

The importance of *Catgate* is that Judge Devittie’s determination was not an aberration but was in line with highly influential House of Lords cases such as *Chikwamba*. And I submit that this aspect of these decisions does most unfortunately give rise to the legitimate, indeed pressing, concern that those cases trespass on the executive and legislative functions because they take proportionality so far as to fail to respect sovereignty of Parliament in the way that ‘the common law grounds of review’ did.⁸¹ I do not want to examine in detail what now pass for the relevant legal principles. I am sufficiently Diceyan to claim that the fundamental issue raised by *Catgate* is the judicial attitude displayed in the Tribunal and Lords cases, which, far from attempting to uphold the comity between the branches of government which constitutes sovereignty of Parliament,⁸² is instead characterised by a want of appropriate deference to as perfectly clear a legislative intention as it is possible to conceive.

⁷⁹ *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105; [2006] QB 1 at para [43] per Laws LJ.

⁸⁰ *R (Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin) at para [40] per Laws LJ.

⁸¹ eg finding The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 SI 1996/30 (which ‘necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it’) to be *ultra vires*, Simon Brown LJ (in the majority in the Court of Appeal) maintained that ‘Primary legislation alone could in my judgement achieve that sorry state of affairs’: *R v Secretary of State for Social Security ex p JCWI* [1997] 1 WLR 275 (CA) at 292, 293. (The appallingly drafted and eventually repealed Asylum and Immigration Act 1996 (c 49) s 11 purported to do this). I am one of those who sees in this case, as Jonathan Sumption QC (as he then was) put it, ‘a vindication of the proper role of the courts’: ‘Judicial and Political Decision-making: The Uncertain Boundary’ [2011] *Judicial Review* 301, 307.

⁸² The nature of the aspect of sovereignty of Parliament called into question by *Catgate* has recently been described in terms suitable to the position after the passage of the Human Rights Act in D Oliver, ‘Parliament and the Courts’ in A Horne *et al* (eds) *Parliament and the Law* (Oxford: Hart, 2013) ch 12.

Sr Soria did not face deportation. He (and Mr Trew) had for years deliberately and unlawfully flouted the conditions on which he obtained entry to the UK until, by committing a minor criminal act, he inadvertently made it no longer possible to continue to do so. His case for not then suffering removal as the consequence of this was of such weight that it seemed sensible and important to raise the fact that he and Mr Trew had a pet cat in support of it. Of course, ownership of pets is an important part of family life, but, again outside of far-fetched speculation, such ownership can speak only to a perfectly ordinary family life, and Parliament obviously did not intend that a family life of this sort would make those in breach of the terms of their entry immune to removal. It is only when courts and tribunals have given the legislative intention such little weight that they effectively repeal the legislation that a family life of this sort can prevent removal. Though there was ‘no suggestion that [Sr Soria’s and Mr Trew’s] relationship has been contrived to prolong his stay’,⁸³ one is perfectly entitled to ask, if Sr Soria could not be removed, who could?⁸⁴ Judge Devittie’s deliberation effectively nullified the application to a perfectly common case of the Asylum and Immigration Act 1999 s 10(1)(a) and the (Rules and) guidance pursuant to it. It was in line with the House of Lords cases cited in it in doing so.

This deliberation also, I submit, did not respect the meaning of Art 8, though I do not wish to be thought to deny that this is a wholly controversial issue. Art 8(2), of course, specifies legitimate grounds ‘necessary in a democratic society’ for interference in what is an explicitly qualified right established under Art 8(1). I repeat the obvious that Sr Soria had a family life. But it was a family life of so ordinary a sort that ownership of a cat was pleaded as evidence of it, as indeed it was. But if so ordinary a family life trumps Art 8(2), despite

⁸³ Sr Soria and Mr Trew entered into a civil partnership in October 2012 and continue to cohabit.

⁸⁴ An unreported decision of the Administrative Court is an example of where the line, in one instance at least, was subsequently drawn: *R (on the applications of Kotecha and Das) v Secretary of State for the Home Department* [2011] EWHC (Admin) 2070.

undeniable legislative intention to the contrary, then a proportionality argument is being used effectively to ignore Art 8(2). With proportionality understood in this way, the existence of a family life effectively quashes the legislative intention and Art 8(2) recognition of it. On the evidence of *Catgate* and the important cases Judge Devittie followed, it may well be fruitless of the Government to draw attention to the Art 8(2) grounds, though it does so, unusually and rather despairingly entering into a sort of debate about how important these grounds are in the very wording of Part 5A. For no amount of drawing attention will help if the courts and tribunals carry out the balancing exercise between Art 8(1) and Art 8(2) in the way it was done in *Catgate*.

I myself doubt that adjudication on the basis of proportionality can respect the democratic delimitation of the functions of the branches of government as well as the traditional grounds of review as they are given their shape within the doctrine of sovereignty of Parliament, and for this reason I believe *Catgate* was latent in the Human Rights Act. But, however this is, what *Catgate* – the House of Lords cases which inform it and the HRA jurisprudence denial of its unacceptability as well as the questionably competent decision-making itself – certainly demonstrates is that the constitutional compromise which was the basis on which the Human Rights Act was passed will be unsustainable if the clear want of appropriate judicial deference displayed in this episode is not amended.

Conclusion

Sub-sections 117B(4) and (5) are a most worrying constitutional innovation in which the Government does indeed propose to trespass on the judicial function. But it is doing so because it sees no alternative way to address its concern that courts and tribunals have themselves trespassed on the executive and legislative functions in respect of immigration policy. This concern is legitimate. The most famous immigration case discussed in this

connection is, I submit, a clear instance of such trespass. The typical inability of both those wishing to criticise and those wishing to defend this case to give an accurate account of its facts or its *ratio* tell of a very worrying polarisation of debate over this issue. The Home Secretary used the influence of her office in a way which was bound to undermine democratic deliberation of the issues, and contributors to the HRA jurisprudence have very often failed to rise above the standard she set. They have sometimes done quite the other thing. I write this paper to criticise their stance.

Catgate is an example of the effective striking down of statute in an area where the vanguard politics of the HRA jurisprudence clash with the predominant public view. Of course, such a clash is implicit in the concept of human rights which stand against the despotic exercise of executive or legislative power even when endorsed by a majority of the electorate. But though it is therefore arguable that human rights law should give the judicial branch the power to strike down primary legislation, and though the aspiration to do so still informs much of the HRA jurisprudence, the Human Rights Act was passed on the basis that it did not do this. Whether it was ever going to be possible to sustain the implicit but vital compromise on the basis of proportionality was doubted when the Act was passed, and Catgate is another instance of its difficulty.

Sub-sections 117B(4) and (5) undeniably invite Art 8 challenge, but any successful challenge cannot but aggravate the current political difficulties. On the other hand, the Joint Committee's and the Constitution Committee's evident wish to avoid these difficulties by, for the moment, accepting the Government's lack of frankness about what it is doing,⁸⁵ also does not appear to be very promising.⁸⁶ It is bound to unravel,⁸⁷ and indeed is perhaps already

⁸⁵ See fn 9 above and accompanying text.

⁸⁶ Joint Committee on Human Rights, fn 3 above, para 56 and Select Committee on the Constitution, fn 4 above, para 16.

unravelling.⁸⁸ The somewhat desperate and certainly very troubling nature of the step the Government is taking in sub-sections 117B(4) and (5) crystallises and will exacerbate a serious uncertainty about the operation of the Human Rights Act. The HRA jurisprudence must acknowledge that it is has played its own role in causing this to happen, in this case and others, if the Human Rights Act is to be put on a sound footing, or, indeed, to survive.

⁸⁷ *ibid*, para 17.

⁸⁸ Joint Committee on Human Rights, fn 2 above, paras 109-11.